

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL C. BARDEN, SR.
Claimant

VS.

MIDWEST TRAILER SUPPLY, INC.
Respondent

AND

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. 1,002,995

ORDER

Claimant requested review of the January 14, 2004 Award by Administrative Law Judge John D. Clark (ALJ). The Appeals Board (Board) heard oral argument on July 20, 2004.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Steve Marsh, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the Board notes that the Award failed to list the deposition of Dan Zumalt as part of the trial record. At oral argument, the parties noted that the deposition should have been included and therefore, the Board will consider that testimony as part of the record.

ISSUES

The ALJ found the opinions of Drs. Robert Eyster and Philip Mills more persuasive and concluded that it is more probable than not that claimant's present complaints of chest wall and low back pain are attributable to an earlier accident that occurred in December 2000, rather than as a result of his subsequent trip and fall accident on November 14, 2001. The ALJ went on to specifically find that any injuries claimant may have suffered on November 14, 2001 were "temporary in nature and therefore all benefits are denied."¹

The claimant requests review of the Award and urges this Board to reverse the ALJ's findings. Claimant alleges that the opinions of his expert, Dr. Pedro Murati, are more persuasive than those of Drs. Mills and Eyster. Claimant contends that he bears a 12 percent permanent impairment as a result of his trip and fall accident and that he cannot return to his job as a long haul truck driver. Thus, claimant maintains he is entitled to work disability benefits based upon a 42 percent task loss and a 100 percent wage loss.

Although not addressed by the ALJ, the claimant also alleges he had an average weekly wage of \$726.44 for the November 14, 2001 alleged date of accident.

Respondent argues the ALJ's Award should be affirmed in all respects. Respondent concedes claimant sustained a compensable accident on November 14, 2001, but asserts that he sustained no permanent injury as a result of that accident. Alternatively, respondent argues that any permanent partial disability award should be limited to claimant's percentage of functional impairment. Respondent contends claimant refused to perform the accommodated work offered to him, and therefore, argues claimant's lack of good faith prohibits any claim for work disability benefits.

Assuming work disability is considered, respondent believes claimant has sustained no additional task loss nor increased limitations attributable to the November 2001 accident. Finally, respondent contends claimant's average weekly wage as of the date of his accident was \$189.90 based upon the wage statement offered and admitted into evidence at the regular hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury when he was involved in a serious vehicular accident near Cedar City, Utah in December 2000. Claimant was treated by Dr. Robert

¹ ALJ Award (Jan. 14, 2004) at 5.

Eyster, a board certified orthopaedic physician. He was diagnosed with a clavicle fracture, shoulder impingement, rotator cuff inflammatory changes, low back pain with fractures to the transverse processes of the lumbar spine along with an increase in irritation of the degenerative disc processes of the lower back. The claimant also was diagnosed with contusions and fractures to his ribs with a previous atelectasis, which is described as a condition of shrinkage of the lungs due to incomplete expansion and results in a shortness of breath. This accident was the subject of a workers compensation claim and has since been settled on a full and final basis. Thus, these injuries are not the subject of the instant claim.²

Claimant returned to work following the December 2000 accident initially on light duty. Respondent created a position for claimant sorting parts, thus allowing him to alter his position as needed during the day. On November 14, 2001, claimant was walking through respondent's warehouse carrying a coffee mug in his hand when he stepped into a drain hole, causing him to fall to the floor, with his chest landing on the cup of coffee. Claimant testified that as a result of this fall, he injured his ribs and lower back. It is this accident and the resulting permanency, if any, that is the subject of this claim.

The ALJ adequately and succinctly summarized the medical evidence in this matter and the Board will not unnecessarily repeat those findings. Dr. Robert Eyster, the physician who treated claimant both for his December 2000 accident as well for the November 2001 accident, concluded that claimant had no permanent impairment as a result of the November 2001 accident.³ Similarly, Dr. Philip Mills evaluated claimant, at respondent's request, and testified that claimant had sustained no permanent impairment as a result of what he diagnosed as a left lateral chest wall contusion.⁴

In contrast, Dr. Pedro Murati, the physician retained by claimant, diagnosed low back pain secondary to bilateral radiculopathy, right SI joint dysfunction along with left costochondritis.⁵ According to Dr. Murati, these conditions are all due to the November 14, 2001 accident, and result in a total 12 percent permanent impairment to the body as a whole.

After weighing all of the evidence contained within the record, the ALJ denied claimant's recovery. He concluded any injuries that the claimant suffered on November 14, 2001 were temporary in nature.

² Claimant settled that claim while still undergoing treatment for his injuries from that first accident.

³ Eyster Depo. at 17. All references to permanency are made pursuant to the 4th ed. of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* unless otherwise noted.

⁴ Mills Depo. at 8.

⁵ Murati Depo. at 8.

The Board has considered the evidence offered to the ALJ as well as the parties' oral arguments and finds no reason to set aside the ALJ's Award. By all accounts, claimant's December 2000 accident was significant and resulted in, among other physical problems, low back pain. After a lengthy period of time off work he returned to what was initially light duty. Claimant then tripped in a drain hole, falling and striking his chest with the coffee cup, sustaining a contusion to his chest wall. Dr. Eyster, who had been treating claimant before this second injury, did not perceive a change in claimant's low back complaints nor did he find any objective radiological change in claimant's physical condition following the November 11, 2001 accident. Even Dr. Murati admitted that the x-rays and MRI revealed no change or abnormalities when compared to the earlier versions. It is true that claimant exhibited an altered gait during one office visit, but that condition did not persist and was again not noted by any other physician, including Dr. Murati.

The Board affirms the ALJ's ultimate finding that claimant has sustained a temporary aggravation of a pre-existing condition and has a 0 percent permanent impairment as a result of the November 14, 2001 accident. However, the Board must modify the Award to the extent it denied any benefits whatsoever to claimant. Because he sustained a temporary aggravation of a pre-existing condition, claimant is entitled to medical benefits associated with the November 2001 accident. He is, however, not entitled to any permanency as found by the ALJ.

Given the Board's decision with respect to permanency, the remaining issues presented by the parties are moot.

All other findings are affirmed to the extent they are uncontradicted by the Board's findings expressed herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 14, 2004 is affirmed in part and modified in part. Claimant is entitled to an award of medical benefits as provided by the Kansas Workers Compensation Act, K.S.A. 44-501 et seq., as a result of his November 11, 2001 work-related accident. Claimant is, however, denied any functional impairment or permanency benefits as a result of that accident.

IT IS SO ORDERED.

Dated this _____ day of July, 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Steve Marsh, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director